Petition

81-1760

No.

Supreme Court, U.S.
FILED
FEB 22 1987
ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

October Term, 1981

LAWRENCE R. MULLIGAN,

Petitioner,

v.

VETERANS ADMINISTRATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

LAWRENCE R. MULLIGAN
Petitioner Pro Se
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Larchmont, New York 10538
(914) 834-2350

QUESTIONS PRESENTED

1. Whether the Supreme Court should resolve the conflicting decisions of three Circuit Courts of Appeals and the Second Circuit Court of Appeals relating to the proper interpretation and extension of this Court's decision in Johnson v. Robison, 415 U.S. 361 (1974) where the Second Circuit found in this action that it did not have jurisdiction to review Respondent's classification of Petitioner as a Veteran ineligible for Veterans' Education Benefits where Petitioner alleges such classification is:

   (a) based on a Veterans Administration regulation which was promulgated in excess of statutory authority and which violates Petitioner's right to equal protection under the law, and

(b) that, in any event, the denial of said benefits by such classification is a violation of Petitioner's right to equal protection under the law.

2. Whether the U. S. District Court and the Court of Appeals erred in denying Petitioner's Motion for Summary Judgment based on a requested judicial interpretation of the statute and the Congressional Record.

3. Whether the U. S. District Court and the Court of Appeals erred in granting Respondent's Motion For Summary Judgment as to the constitutionality of the statute itself, because the sole factual finding by the Court on which its decision rests was a material, disputed issue of fact thereby precluding the granting of summary judgment.

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

LAWRENCE R. MULLIGAN,

Petitioner,

v.

VETERANS ADMINISTRATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Petitioner, Lawrence R. Mulligan, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on October 9, 1981 (Rehearing denied November 25, 1981).

OPINIONS BELOW

The text of the opinions of the Board of Appeals for the Veterans Administration are reproduced at A25 and A37. The text of the opinion of the U.S. District Court for the Southern District of New York is not reported but is reproduced at A7. The text of the opinion of the Court of Appeals for the Second Circuit can not be reported but is reproduced at A1.

JURISDICTION

On October 9, 1981, the Court of Appeals for the Second Circuit entered an order affirming the denial of Petitioner's motion for summary judgment and granting Respondent's motions for summary judgment. A1. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Jurisdiction of the United States District Court for the Southern District

of New York was invoked under 28 U.S.C. §1331, §1346 and §1361.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

United States Constitution, Amendment V:

> ...nor shall any person... be deprived of...property, without due process of law....

United States Constitution, Amendment XIV:

> No state shall deny to any person... the equal protection of the laws.

Statutes:[1]

STATEMENT OF THE CASE

Petitioner is a veteran who served in the United States Air Force Reserve during the Viet Nam War era for a continuous period of active duty for training in

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1 Because of their length, the relevant statutory provisions and regulations are reproduced at Appendix H, A-56 infra.

excess of 180 days, the number of days of active duty necessary to qualify a veteran for education benefits as set forth in 38 U.S.C. §1652(a). Petitioner contends his qualifying, continuous active duty for training, all of which occurred at Air Force bases in Texas, was quantitatively and qualitatively equal to the active duty performed by active duty performers in that era.

Upon his release from his duty tour, Petitioner sought education benefits. The Respondent denied him benefits on the sole ground that his active duty for training was not "qualifying service" for such benefits. There is no dispute as to any other eligibility requirement.

Over a period of eight years, Petitioner exhausted all administrative remedies resulting in two decisions of the Board of Appeals for the Respondent in which it denied him benefits and indicated

the constitititutional questions he presented were beyond its power to review. A25 and A37. This action followed.

Petitioner contends that the United States District Courts have the power to review his classification by the Veterans Administration because the statute under which education benefits are granted (38 U.S.C. §1651, et seq.) indicates Petitioner is eligible for education benefits but the Administration's regulations concerning eligibility define Petitioner's active duty for training as "non-qualifying service" for education benefits. (38 C.F.R. §21.1021, §3.6(b)) Petitioner specifically contends that 38 U.S.C. §1652(a)(3)(C) excludes as qualifying service relevant hereto only active duty for training which was performed pursuant to §511(d) of 10 U.S.C. and not all active duty for training as that term is defined at 38 U.S.C. §101(21),(22). (See also 10

U.S.C. §101(21) which defines Petitioner's active duty for training as active duty.) By stipulation in this action it has been agreed that Petitioner's active duty for training was not performed pursuant to 10 U.S.C. §511(d).

Petitioner further contends that all references to the Congressional Record (see for e.g. those hearings cited in Table of Authorities herein) support his contentions as references to "6 month enlistees" are, in fact, references to 10 U.S.C. §511(d) active duty for training performers. This contention is further supported by the 1974 amendment to 38 U.S.C. §1652(a)(3)(C) which related only to 10 U.S.C. §511(d) active duty for training performers as indicated by the statutory language itself and the Administrator of the Veterans Administration in his letter to the Chairman of the Committee on Veterans' Affairs. (H.R. 792 93rd

Cong. 2d Sess. 15 (1974), reprinted in [1974] U.S. Code Cong. & Admin. News 6324.) That amendment allowed the recapture (for computation of benefits) of the §511(d) active duty for training performer's initial non-qualifying service if he subsequently performed one year of active duty. If, as the lower Courts found, Petitioner is similarly situated to §511(d) veterans [App. C, A18-A19; App. A, A2] then he would clearly be denied equal protection as a result of this 1974 saving clause which applied only to §511(d) active duty for training performers and not to Petitioner's class of non-§511(d) performers.

Petitioner argues that the regulations are, in effect, an unconscious attempt to legislate and go beyond the Administrator's power to make regulations. He also urges the decision denies him

equal protection of the laws to the extent that similarly situated Veterans are eligible for education benefits. In Johnson v. Robison, 415 U.S. 361 (1974), this Court said at pp. 374-375:

> In determining whether, in limiting the class of draftees entitled to benefits to those who serve their country on active duty in the Armed Forces, Congress denied equal protection of the laws to Selective Service registrants who perform alternative civilian service as conscientious objectors, our analysis of the classification proceeds on the basis that, although an individual's right to equal protection of the laws "does not deny... the power to treat different classes of persons in different ways[;] ... [it denies] the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."

Surely, if Congress is without power to ~~deny~~ treat "similarly situated" veterans differently, the Respondent cannot do so by regulation.

In the alternative, Petitioner argues that the statute itself would be unconstitutional if the Court finds that the Veterans Administration has interpreted it correctly in its regulation. In this event, Petitioner argues that the statute arbitrarily creates classes of veterans which classifications do not rest on a distinction or dissimilarily which provides a rational basis for determining that one class receive education benefits while the other does not.

Since both the lower Courts, relying on 38 U.S.C §211, determined that they did not have jurisdiction to review Petitioner's claims against the Respondent, there has yet to be a judicial interpretation of the statutory language, in-

cluding a comparison of the regulation with the express language of the statute. Since the Board of Veterans Appeals based its decisions, in part, on the regulations in dispute here [App. D, A35; App. E, A39] it is clear the Respondent's decision to deny Petitioner benefits was based on the regulations; which Respondent argues are identical in scope and effect to the statutory provisions.

Since the Board of Veterans Appeals denied authority to review Petitioners' constitutional claims [App. E, A49-50] and the Court of Appeals determined it did not have jurisdiction to review such claims against the Respondent [App. A, A3], this issue has not been reviewed.

Petitioner respectfully submits he is entitled to such judicial review.

On October 9, 1981, the Court of Appeals for the Second Circuit affirmed the decision of the United States District

Court for the Southern District of New York [App. A,B,C], denying Petitioner's motion for summary judgment and granting Respondent's motions for summary judgment. Rehearing was denied in both courts [App. F,G].

REASON FOR GRANTING THE WRIT

THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH DECISIONS OF THE COURTS OF APPEALS FOR THE SIXTH, SEVENTH AND NINTH CIRCUITS.

The Court of Appeals essentially found that two of Petitioner's primary claims were beyond judicial review because of the bar to judicial review found at 38 U.S.C. §211(a) despite Petitioner's allegations that the Veterans Administration's decision was (1) a denial of equal protection to Petitioner and (2) a decision based on an administrative regulation of the Veterans Administration which regulation was promulgated in excess of

the Administrator's authority. [See App. A, A3, 38 U.S.C. §210(c)(1)].

The Seventh Circuit Court of Appeals has determined a similar case differently, finding that where a challenge is made to the administrator's regulation making authority or involves constitutional questions beyond the administrator's authority, 38 U.S.C. §211(a) does not present a bar to judicial review. In Taylor v. United States of America, 385 F.Supp. 1034 (1974), jmt. vacated as moot , 528 F.2d 60 (7th Cir. 1976), the Court said at p. 1036 of 385 F.Supp.:

> ...the Court is of the opinion that 38 U.S.C. §211 is not applicable in this case because there is no decision of an administrator on a question of law or fact pertaining to the administration of benefits. In addition §211 has never prevented judicial review where the controversy involved constitutional questions beyond the scope of authority of the Veterans Administration. (emphasis supplied)

In Wayne State University v. Cleland, 590 F.2d 627 (6th Cir. 1978), the Sixth Circuit Court of Appeals also determined that a Veterans Administration regulation, alleged to have been promulgated in excess of the Administrator's authority was not beyond the scope of judicial review. That Court, relying on a reasonable extension of this Court's decision in Johnson v. Robison, supra said at pp. 631, 632 of 590 F.2d:

> The Johnson rationale is particularly appropriate in the present case. Suits challenging the authority to promulgate regulations will not involve the federal courts in the day to day operations of the V.A. Neither will our construction of §211(a) spawn suits requesting federal courts to second guess the Administrator on the merits of particular claims for benefits or the termination of such benefits. Suits challenging the statutory authority of the Administrator will not involve the courts in the complex and technical niceties of V.A. policy, but rather will seek a determination whether regulations have been promulgated pursuant to a congressional grant of authority. If we construe §211(a) to bar judicial review of the

> present case, we would be finding a congressional intent to insulate from judicial review the limits of the Administrator's authority. This construction is not supported by the legislative history of §211(a). Such a construction would also raise serious doubts about the statute's constitutionality. We refuse to place such a construction on §211(a) for neither its text nor its scant legislative history provides the "clear and convincing" evidence of congressional intent required by the Supreme Court before a statute will be construed to restrict access to judicial review. (citations omitted) (footnotes omitted)

In Devine v. Cleland, 616 F.2d 1080 (9th Cir. 1980), the Court said at p. 1086 of 616 F.2d, in determining that the right to Veterans education benefits was a "property interest" such as would entitle the veteran to due process:

> The class, if "eligible veterans" ... and if enrolled and taking the prescribed units of approved courses at an educational institution meeting the requirements of 38 U.S.C. §1651 et seq., has a statutory entitlement to receipt of an educational assistance allowance. Such a statutory entitlement does constitute a "property right" protected by the Due Process Clause. (citations omitted)

Accordingly there is presented a conflict between these Circuits and the Second Circuit on the scope of judicial review permitted in view of the judicial review bar at 38 U.S.C. §211(a). The Circuits each cite this Court's decision in Johnson v. Robison, supra, as authority, but the Second Circuit has come to a different conclusion regarding the scope of judicial review than have the three Circuits above. [See also Arnolds v. Veterans Administration, 507, F.Supp. 128 (N.D. Ill. 1981)]

THE CONSTITUTIONALITY OF THE STATUTE (38 U.S.C. §1652)

As to the third claim raised in the appeal concerning the lower Courts granting summary judgment to Respondent despite Petitioner's claim that the factual determination made by the lower court was a material disputed issue of fact thus

precluding the granting of a Rule 56 motion for summary judgment, Petitioner resubmits error and relies on this Court's decision in Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464 (1962).

In this action, the District Court allowed a factual allegation by respondent's counsel, unsupported by any proof, such as an affidavit by a person with knowledge, that veterans eligible for education benefits "generally serve two years of active duty." [See the Court's opinion: App. C, A19]. It is noted that 38 U.S.C. §1652 only requires more than 180 days active duty for eligibility and not two years. This sole alleged quantitative dissimilarity between the class of eligible veterans and the class of non-10 U.S.C. §511(d) active duty for training performers was found to justify the "dif-

ferent treatment" afforded the two classes. [App. C, A19].

Petitioner submitted an affidavit in opposition to the motion indicating this was a disputed fact along with a Rule 9(g) statement as required by the local rules of the Court setting forth that the allegation was, in any event, insufficient since there was no proof adequate to support a Rule 56 motion. Petitioner further alleged that even if the allegation was true, it had no bearing on the equal protection argument since veterans serving in excess of 180 days receive benefits in proportion to the number of months served. [See 38 U.S.C. §1661]. By virtue of this provision, Congress must have intended that persons with less than two years active duty but more than 180 days would be eligible for benefits.

CONCLUSION

The bar to judicial review found at 38 U.S.C. §211 does not preclude judicial review of regulations promulgated in excess of the administrator's authority nor claims that the Administration has violated Petitioner's right to equal protection of the law.

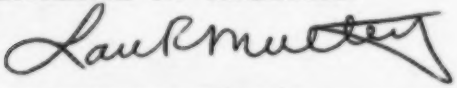
The motion for summary judgment on the issue of the constitutionality of the statute should not have been granted on the grounds of a factual finding which was material to the cause and disputed.

For the foregoing reasons, Petitioner Lawrence R. Mulligan respectfully requests that a writ of certiorari issue to review the order of the United States Court of Appeals for the Second Circuit.

Dated: February 8, 1982

Respectfully submitted,

LAWRENCE R. MULLIGAN



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Appendix

APPENDIX A

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be rereported, cited or otherwise used in unrelated cases before this or any other court.

UNITED STATES COURT OF APPEALS

For the Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the nineth day of October One Thousand Nine Hundred and Eighty-one.

PRESENT:
HON. J. EDWARD LUMBARD, Circuit Judge
HON. WALTER R. MANSFIELD, Circuit Judge
HON. ELLSWORTH A. VAN GRAAFEILAND, Circuit Judge

- - - - - - - - - - - - - - - - - x

LAWRENCE R. MULLIGAN,

Plaintiff-Appellant,

v. ORDER

VETERANS ADMINISTRATION, 81-6046

Defendant-Appellee.

- - - - - - - - - - - - - - - - - x

Appeal from an order of the United States District Court for the Southern District of New York (Sand, J.) entered December 29, 1980, granting appellee's motion for summary judgment and dismissing appellant's claims for veterans' education benefits.

Upon graduation from high school, appellant, Lawrence Mulligan, enlisted in the Air Force Reserve for a period of six years. During this period he was assigned to active duty for training pursuant to 10 U.S.C. 672(d) for a period of 191 days. At the end of his enlistment period, Mulligan was honorably discharged from the Reserves.

In 1972, Mulligan applied to the Veterans Administration for education benefits. The VA determined that Mulligan's prior status of "active duty for training" was

not the type of service that qualifies a veteran for education benefits. The Board of Veterans' Appeals affirmed. This declaratory judgment action followed.

Appellant contends on appeal that his challenge is directed to regulations of the Veterans Administration. We conclude, however, that appellant's application for benefits was denied on the basis of statutory provisions. A veteran is only eligible for education benefits if he served on "active duty." 38 U.S.C. §1652 (a)(1)(A). "Active duty" is defined elsewhere in the Code as "full time duty in the Armed Forces other than active duty for training." 38 U.S.C. §101(21). Judicial review of appellant's claim is precluded by 38 U.S.C. §211(a). See Johnson v. Robison, 415 U.S. 361 (1974). Appellant also challenges the constitutionality of the statutory classification

scheme. The purposes underlying the enactment of the education benefit legislation are set forth at 38 U.S.C. §1651. Congress intended to provide benefits "to compensate for the disruption that military service causes to civilian lives." Id. at 377. It is obvious that "active duty for training," even of 191 days, does not disrupt normal civilian life to the same degree as regular active duty. The distinction is supported by a rational basis. We affirm.

/s/ Hon. J. Edward Lumbard

/s/ Hon. Walter R. Mansfield

/s/ Hon. Ellsworth A. Van Graafeiland

Filed: October 9, 1981
A. Daniel Fusaro, Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - x

LAWRENCE R. MULLIGAN, :

Plaintiff, :

against- : JUDGMENT

VETERANS ADMINISTRATION, :

Defendant. :

- - - - - - - - - - - - - - - - - x

Defendant having moved for summary judgment and the plaintiff having crossmoved for summary judgment as to his Second Claim, and the said motions having come before the Honorable Leonard B. Sand, United States District Judge, and the Court thereafter on December 17, 1980, having handed down its opinion granting defendant's motion for summary judgment with respect to all of plaintiff's claims, it is,

ORDERED, ADJUDGED AND DECREED: That the complaint be and it is hereby dismissed as to all of plaintiff's claims.

Dated: New York, N.Y.
December 29, 1980

/s/_____
Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - -X

LAWRENCE R. MULLIGAN, :

Plaintiff, : 79 CIV 1993 (LBS)

-against- :

VETERANS ADMINISTRATION, : OPINION

Defendant. :

- - - - - - - - - - - - - - -X

APPEARANCES: (See last page)

SAND, J.

The question presented by the instant motions is whether the claims of the pro se plaintiff herein that he was incorrectly denied veterans educational benefits warrant the grant of summary judgment. We find that we do not have jurisdiction to review plaintiff's statutory claims, and that his constitutional claims are without merit. We therefore grant defendant's motions for summary judgment.

FACTS

The following facts have been stipulated by the parties.

On June 26, 1968, plaintiff enlisted in the United States Air Force Reserve pursuant to 10 U.S.C. §510, after he was advised of his selection to attend the United States Air Force Academy Prepara-

tory School. On July 8, 1968, plaintiff was ordered to perform active duty pursuant to 10 U.S.C. §672(d). That order was revoked, on July 16, 1968, after plaintiff declined to attend the United States Air Force Academy Preparatory School. On August 28, 1968, plaintiff was mandatorily assigned to the 34th Medical Service Squadron, Air Force Reserve. On October 29, 1968, plaintiff was ordered to active duty for training for a continuous period in excess of 181 days, to occur at Air Force bases in Texas. Plaintiff performed this duty for more than 181 days, and was duly separated from it on June 10, 1969. This duty was not performed pursuant to 10 U.S.C. §511(d)[1/]. On June 26, 1974, plaintiff was honorably discharged from the Air Force.

Plaintiff has been denied education benefits which he claimed pursuant to 38

U.S.C. §1651 et seq. The sole ground for defendant's denial of benefits is that plaintiff's period of active duty for training from December 1, 1968 to June 10, 1969 was not qualifying "active duty," pursuant to 38 U.S.C. §§ 101 and 1652(a), for the purposes of determining eligibility for educational benefits.

In this action, plaintiff seeks review of defendant's denial of education benefits, asserting three claims for relief.[2/] Each claim, and the motions filed with respect to it, will be discussed in turn.

Plaintiff's First Claim

In his first claim for relief, plaintiff alleges that defendant's denial of his application should be reversed because it was arbitrary and capricious or without a rational basis. Complaint ¶12. Defendant has moved for summary judgment with re-

spect to his claim on the ground that this Court lacks subject matter jurisdiction over it, in that 38 U.S.C. §211(a)[3] makes final and non-reviewable all decisions of the Veterans Administration on issues of law or fact pertaining to benefit entitlement. Plaintiff confirmed at oral argument that he does not oppose this motion, and it is therefore granted without opposition.

Plaintiff's Second Claim

In his second claim for relief, plaintiff alleges that the statutory language of 38 U.S.C. §§ 1651, 1652(a)(1) and 1652(a) (3) (C) on its face indicates his entitlement to educational benefits, and that in denying him benefits, defendant has incorrectly classified him. Complaint ¶17.[4] Cross motions for summary judgment have been filed with respect to this claim.

Plaintiff argues that his entitlement to educational benefits turns on the definition of the "active duty" required by 38 U.S.C. §§ 1652(a)(1)(A), 1661(a) for entitlement to educational benefits. Plaintiff contends that the relevant definition is provided, not by 38 U.S.C. §101(21), the general definitional provision, but rather by 38 U.S.C. §1652(a)(3), the definitional section in the educational benefits chapter.[5/] He asserts that section 1652(a)(3)(C) only specifically excludes veterans who served on active duty for training pursuant to 10 U.S.C. §511(d). Since he served on active duty for training pursuant to 10 U.S.C. §672 (d), plaintiff concludes that he is not excluded by the statute from educational benefits, and that the denial of benefits violates his right to equal protection laws.

Defendant argues that under 38 U.S.C. §211(a), this Court lacks jurisdiction to review the Veterans Administration's interpretation and application of the statute, and that, therefore, plaintiff's second claim must be dismissed to the extent it challenges the interpretation and application of the statute by the Veterans Administration in his case. Alternatively, in the event the Court finds jurisdiction over the statutory question, defendant argues that the specific exclusion of 10 U.S.C. §511(d) reservist veterans in 38 U.S.C. §1652 was meant to add to the exclusions contained in 38 U.S.C. §101, rather than to limit the application of Section 101(21) in the context of educational benefits. Therefore, defendant concludes, plaintiff was properly denied educational benefits because his active duty for training under 10 U.S.C. §672(d) does not satisfy the

definition of "active duty" in 38 U.S.C. §101(21). Finally, defendant reiterates its contention that this Court lacks jurisdiction over plaintiff's second claim, except to the extent it challenges the constitutionality of the statute itself, and argues that there is a rational basis for, and a legitimate governmental objective underlying, the challenged statutory distinction. This last contention addresses plaintiff's third claim, and it will be discussed infra.

According plaintiff's second claim a liberal construction, we find that this claim amounts to a challenge of the Veterans Administration's interpretation and application of the relevant statutory provisions. It does not allege invidious discrimination in application of the statute to plaintiff or to any class to which he might belong, and does not raise

a constitutional claim. See Johnson v. Robison, supra at 377-78, 383 & n.18. Therefore, review by this Court is precluded by 38 U.S.C. §211(a). See Johnson v. Robison, supra at 361, 367, 370-73.

Plaintiff, however, relying on Johnson v. Robison, supra, contends that we may review the Veterans Administration's determination in order to allow an otherwise unconstitutional statute to function constiutionally. This contention is without merit. In Robison, to allow section 211(a) to function constitutionally, the court read section 211(a) as allowing challenges to the constitutionality of the statute, although recognized that review of claims of misclassification were specifically excluded from judicial review by section 211(a). See id. at 367. Therefore, the only question properly raised by plainiff is whether the statute itself is

constitutional, and we therefore grant defendant's motion for summary judgment with respect to plaintiff's second claim on the ground that section 211(a) precludes review of that claim.

Plaintiff's Third Claim

In his third claim for relief, plaintiff alleges that, if the Court determines that he is ineligible for educational benefits, the statutory classification violates the equal protection clause in that it mandates different treatment of similarly situated veterans. Complaint ¶16. Having found plaintiff's classification by the Veterans Administration unreviewable in this Court, we will address this claim.

Plaintiff does not challenge the general distinction between reservist and active duty veterans. Rather, plaintiff argues that his active duty for training for 191

days under 10 U.S.C. §672(d) is, in terms of length of commitment and loss of personal freedom, more akin to active duty than to active duty for training under 10 U.S.C. §511(d), which during the relevant period required a four month minimum training period.[6/] Plaintiff concludes that he is therefore similarly situated to active duty veterans.

Plaintiff has not moved for summary judgment with respect to this claim, and has requested that determination of its merits await disposition of his motion with respect to his second claim. Defendant, however, has moved for summary judgment with respect to plaintiff's third claim. Plaintiff was advised of the Court's intention to address this claim, and was accorded an opportunity to submit a supplemental brief, which he declined.

As noted supra, defendant contends that the statute is constitutional because it is supported by a rational basis and a legitimate governmental objective. In addition, defendant asserts that if the Court denies defendant's motion with respect to the third claim, a plenary hearing should be held to determine either or both of the following issues: (1) whether Mulligan and the class of veterans who are entitled to benefits are in fact similarly circumstanced such that the difference in treatment afforded them under the statute constitutes a denial of equal protection; and (2) whether the facts establish that the line drawn by Congress between veterans who are afforded benefits and those who are not is founded upon a rational basis. Such a hearing is unnecessary because we find that plaintiff's active duty for training, which lasted approximately two months longer

than the minimum period mandated by 10 U.S.C. §511(d)[7], was not sufficiently different from service under §511(d) to equate the disruption of plaintiff's life and his need for readjustment with those of active duty veterans, who generally serve two years on active duty, followed by a four year reserve commitment. See Johnson v. Robison, supra at 378. We therefore find that the statutory classification challenged by plaintiff, who is similarly situated to 10 U.S.C. §511(d) reservist veterans, but not to active duty veterans,[8] is rationally related to the legitimate legislative purposes[9] stated in 38 U.S.C. §1651, in that it would "enhanc[e] and make more attractive service in the armed forces of the United States." 38 U.S.C. §1651. See Johnson v. Robison, supra at 376, 382.

Plaintiff's third claim for relief is therefore without merit and defendant's motions for summary judgment with respect to all of plaintiff's claims are granted.

SO ORDERED.

Dated: New York, New York
December 17, 1980

/s/_____
U.S.D.J.

FOOTNOTES

1. Although the stipulation of uncontested facts does not so state, it is not in dispute that plaintiff's duty was performed pursuant to 10 U.S.C. §672(d). Defendant's Memorandum of Law at 4; Plaintiff's Memorandum of Law at 11; Plaintiff's Exhibit O in Support of Motion for Summary Judgment.

2. Plaintiff stated two causes of action in his pro se complaint. However, he subdivides his second cause of action into two alternatives, which will be treated as his second and third claims for relief.

3. 38 U.S.C. §211(a) provides in relevant part:

> "[T]he decision of the Administrator on any question of law or fact under any law administered by the Veterans Administration providing benefits for veterans and their dependents or survivors shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise."

4. In his Memorandum of Law at 9, plaintiff described his second claim as follows:

> "[D]efendant has improperly placed him in a class of veterans...ineligible for veterans educational benefits (...§511(d) veterans) rather than with the class of eligible veterans to which he claims he belongs... [thereby] deny[ing] him a right and privilege enjoyed by others of his class of similarly situated veterans."

5. But see Johnson v. Robison, 415 U.S. 361, 363 (1974) (applying active duty definition in 38 U.S.C. §101(21) to eligibility requirement for educational benefits under 38 U.S.C. §1661(a)); H.R.Rep. No. 1258, 89th Cong. 2d Sess., reprinted in [1966] U.S. Code Cong. Ad. News 1888, 1893 ("the definition of active duty contained in 38 U.S.C. §101(21), is applicable" to educational benefits).

6. The minimum period has since been reduced to three months. See 10 U.S.C. §511(d).

7. See fn. 6 supra.

The notice which ordered plaintiff to report for active duty pursuant to 10 U.S.C. §672(d) specified that such duty was for training purposes and that it would be limited to 191 days. Plaintiff's Exhibit G in Support of Motion for Summary Judgment. Such a "short period of orderly planned service", S.Rep. No. 93-907, 93rd Cong. 1st Sess. 62 (1974), for training

only is not equivalent to the military service performed by active duty veterans. See Johnson v. Robison, supra at 377-83 (citing S.Rep. No. 269, 89th Cong. 1st Sess. (1965)). Plaintiff may therefore only challenge the general distinction between reservist and active duty veterans.

The rational basis test applies to this classification. See Johnson v. Robison, supra at 374-75 & n.14; 376; 378; 381-82.

APPEARANCES

For the Plaintiff:
LAWRENCE R. MULLIGAN, appearing pro se

For the Defendant:

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New York, New York 10007
SUSAN M. CAMPBELL, Asst. U. S. Attorney

APPENDIX D

BOARD OF VETERANS APPEALS

Washington, D. C. 20420

IN THE APPEAL OF	)	FINDINGS AND
	)	DECISION
LAWRENCE R. MULLIGAN	)	
C 28 415 598	)	March 9, 1978
	)	
	)	Docket No.
	)	77-23 733

THE ISSUE

Entitlement to educational assistance allowance under Chapter 34, Title 38, United States Code.

REPRESENTATION

Appellant represented by:

Disabled American Veterans

CONSULTATIONS BY THE BOARD

Kenneth R. Andrews,

Staff Legal Adviser

CONTENTIONS

The appellant and his representative contend that his assignment to the Reserve component was mandatory and not voluntary; that he was on active duty for 191 days; that his active service was accomplished pursuant to 10 U.S.C. 672(d); that this service does not fall within the exclu-

sions under 38 U.S.C. 1652 and was qualifying active duty; and that he is eligible for educational benefits.

THE EVIDENCE

In June 1968, the appellant was informed of his selection to attend the United States Air Force Academy Preparatory School. By letter from the Air Reserve Personnel Center dated June 18, 1968, a copy of which was furnished to him, he was advised that a selectee must be enlisted as an Airman Basic for six years. He then enlisted in the Air Force Reserve on June 26, 1968, for a period of six years. By special order dated July 8, 1968, he was ordered to extended active duty on a voluntary basis for a period of one year beginning July 11, 1968, for the purpose of assignment to the student squadron at the United States Air Force Academy Preparatory School following approximately 30

days of basic military training.

On July 16, 1968, the order to extended active duty was revoked since the claimant had declined to attend the preparatory school as scheduled. On August 28, 1968, he was relieved from the original assignment and assigned to a medical service squadron of the Air Force Reserve. He was designated a ready Reservist.

A copy of the request and authorization for active duty training/non-prior service was received from the National Personnel Records Center on October 21, 1976. In October 1968 the appellant was ordered to initial active duty for training for 191 days beginning December 1, 1968. He was scheduled to attend basic military training, followed by a basic medical helper course and a medical lab specialist course. Authority cited included AFM35-3

and 10 U.S.C. §672(d).

The appellant submitted an original application for a program of education in June 1972. Another application was received in July 1973, at which time he was scheduled to attend law school beginning in September 1973. The report of discharge, DD Form 214, was received in July 1973. This document shows that on June 10, 1969, he was released from active duty upon completion of active duty for training as a non-prior service ready Reservist under AFM35-3. A statement of service dated October 30, 1974, and other evidence of record, show that following his initial 191 day tour of active duty training he attended four periods of annual training of two weeks' duration. He was discharged from the Air Force Reserve on June 25, 1974, the expiration of his six-year term of service.

THE LAW AND REGULATIONS

For the purposes of Title 38, United States Code, the term "veteran" means a person who served in the active military, naval or air service, and who was discharged or released therefrom under conditions other than dishonorable. The term "active duty" means full-time duty in the Armed Forces, other than active duty for training. The term "active duty for training" means full-time duty in the Armed Forces performed by Reserves for training purposes. (38 U.S.C. 101(2)(21)(22)).

For the purpose of Chapter 34, Title 38, United States Code, the term "eligible veteran" means any veteran who served on active duty for a period of more than 180 days, any part of which occurred after January 31, 1955. (38 U.S.C. 1652(a)(1)(A)).

Basic eligibility for educational assistance is subject to the requirement that the veteran must have served on active duty for a continuous period of 181 days or more, any part of which occurred on or after February 1, 1955. (38 C.F.R. 21. 1040(a))

DISCUSSION AND EVALUATION

Although the appellant maintains that he performed qualified military service for entitlement to educational benefits, his active duty was for training purposes only pursuant to enlistment in a Reserve component. The evidentiary record shows that he voluntarily enlisted for a term of six years in the Air Force Reserve and was initially ordered to extended active duty for the purpose of basic military training and attendance at the United States Air Force Academy Preparatory School. Had he attended the preparatory school as sched-

uled, the time served as a precadet assignee would have been considered active duty service. However, he declined the assignment, and the initial order was revoked. He was then assigned to a Reserve unit, from which he was ordered to active duty for training.

The primary contention advanced is to the effect that he was ordered to active duty under 10 U.S.C. 672(d) and that his service is not excluded from the term "active duty" under 38 U.S.C. 1652 and 38 U.S.C. 1661 for entitlement to educational benefits. The issue, however, is basic entitlement to veterans' benefits. The appellant does not meet the definition of "veteran" since all of the full-time duty he performed in the Armed Forces was as a Reserve for training purposes only. Therefore, since he had no period of active duty, he is not an "eligible veteran" for

the purposes of Chapter 34 educational benefits. Title 10, United States Code, Section 672(d) under general provisions for Reserve components, provides that a member of a Reserve component may be ordered to active duty with his consent. It is pointed out that the words "active duty for training" were omitted from this section as covered by the words "active duty." (See explanatory notes, 10 U.S.C.A. Section 672.) Hence, a plain language interpretation of this section could be misleading. The Board notes that the claimant's orders to active duty for training also cited as authority AFM35-3. Chapter 33-5, paragraph A, entitled "Active Duty for Training," provides that all nonprior service enlistees will be ordered to active duty for training for a minimum period of four months and such additional period as may be required to complete technical training. Paragraph B provides

that orders will cite 10 U.S.C. 672(d). Therefore, the use of Section 672 as authority in no way changes the nature of the military service performed. Further, the contention that his service is not specifically excluded from qualifying active duty under 38 U.S.C. 1652 is not relevant to the issue presented on appeal since all of his Reserve duty was for training purposes only. The Board is aware that the claimant has also stated that the training performed was not voluntary. However, his enlistment in the Reserves was on a voluntary basis. For such an enlistee, active duty for training is mandatory. But his service as a ready Reservist may not be said to be involuntary.

It is clear that Congress did not intend that educational assistance benefits be granted to individuals who were only on

active duty for training purposes pursuant tc enlistment in a Reserve component. The Board finds that the appellant's service does not qualify as active duty for which Veterans Administration educational benefits may be authorized.

FINDING OF FACT

The appellant was on active duty for training purposes as a non-prior service ready reservist in the United States Air Force Reserve from December 1, 1968, to June 10, 1969.

CONCLUSION OF LAW

Active duty for training purposes as a member of a Reserve component does not meet the requirements for entitlement to educational assistance benefits under Chapter 34, Title 38, United States Code. (38 U.S.C. 101(1)(21)(22), 1652(a)(1)(A); 38 C.F.R. 21 1040(a)).

DECISION

Entitlement to educational assistance allowance under Chapter 34, Title 38 United States Code, is not established. The benefit sought on appeal is denied.

/s/_____
BRUCE KANEE

/s/_____
C. S. ROSS

/s/_____
RAE WOOD

APPENDIX E

Board of Veterans Appeals
Washington, D.C. 20420

IN THE APPEAL OF		
LAWRENCE R. MULLIGAN	)	Docket No.
FINDINGS AND DECISION	)	78-23123
(RECONSIDERATION)	)	Date:
	)	January 10,
	)	1979

THE ISSUE

Entitlement to educational assistance allowance under Chapter 34, Title 38, United States Code.

REPRESENTATION

Appellant represented by:
Disabled American Veterans

CONSULTATIONS BY THE BOARD

Frank Letchworth, Staff Legal Adviser

ACTIONS LEADING TO PRESENT APPELLATE STATUS

This case was before the Board in March 1978, at which time it was unanimously held the appellant was not entitled to educational assistance allowance under Chapter 34, Title 38, United States Code. It has been requested that this decision be reconsidered. Accordingly, two Sections of the Board are participating in reconsideration of the decision of March 1978.

In its decision of March 1978, the Board made the following finding of fact:

> "The appellant was on active duty for training purposes as a nonprior service ready reservist in the United States Air Force Reserve from December 1, 1968, to June 10, 1969."

Accordingly, the Board reached the following conclusion of law:

> "Active duty for training purposes as a member of a Reserve component does not meet the requirements for entitlement to educational assistance benefits under Chapter 34, Title 38, United States Code. (38 U.S.C. 101(1)(21)(22),1652(a)(1)(A); 38 C.F.R. 21.1040(a))"

CONTENTIONS

The appellant and his accredited representative contend, in substance, the prior decision was erroneous for several reasons. It is asserted that the determination of his enlistment and active duty was in error as it ignored his original orders to active duty. It is maintained the application of 38 U.S.C. 101(21) and (22) was erroneous in that the subsequent enactment of Chapter 34 provided definitions specifically applicable to educational assistance benefits and did not

exclude his service pursuant to 10 U.S.C. 672(d). It is maintained an award of educational assistance benefits would be just and equitable as the appellant originally intended to enter the United States Air Force Academy Preparatory School and would have spent nine or more years on active duty, his transfer to the Ready Reserves was involuntary, and he lost an entire year of education at Villanova University as a result of his involuntary assignment to active duty for training at midsemester. It is also asserted that a denial of such benefits would deny him equal protection under the law if premised solely upon his Reserve classification.

THE EVIDENCE

In June 1968, the appellant was informed of his selection to attend the United States Air Force Academy Preparatory

School. He was furnished with a copy of a letter from the Air Reserve Personnel Center, dated June 18, 1968 advising him that a selectee must be enlisted as an Airman Basic for a six-year period. He then enlisted in the Air Force Reserve on June 26, 1968, for a six-year period. By special order of July 8, 1968, he was ordered to extended active duty on a voluntary basis for a period of one year beginning July 11, 1968, for the purpose of assignment to the student squadron at the United States Air Force Academy Preparatory School, following approximately 30 days of basic military training.

On July 16, 1968, the order to extended active duty was revoked as the appellant had declined to attend the preparatory school as scheduled. On August 28, 1968, he was relieved from the original assignment and was assigned to a medical service

squadron of the Air Force Reserve. He was designated a Ready reservist.

In October 1976, the Administration received a copy of the request and authorization for active duty training/nonprior service from the National Personnel Records Center. This revealed that in October 1968 the appellant was ordered to initial active duty for training for 191 days beginning December 1, 1968. He was scheduled to attend basic military training, followed by a basic medical helper course and training as a medical laboratory specialist. The authority cited therein included AFM35-3 and 10 U.S.C. 672(d).

In June 1972, the appellant applied for educational assistance benefits. Another application was received in July 1973, wherein the appellant indicated he was

scheduled to attend law school beginning in September 1973. In July, 1973, the Administration received his report of discharge (DD Form 214), showing that on June 10, 1969, he was released from active duty upon completion of active duty for training as a non-prior service Ready Reservist under AFM35-3. A statement of service, dated October 30, 1974, and other evidence of record show that, following his initial 191-day tour of active duty for training, he attended four periods of annual training of two weeks' duration. He was discharged from the Air Force Reserve on June 25, 1974, at the expiration of his six year term of service.

THE LAW AND REGULATIONS

The decision of the Board of Veterans Appeals is final, except that the Board may correct an obvious error in the record. Reconsideration of an appellate

decision may be accorded by the Board of Veterans Appeals. (38 U.S.C. 4003; 38 C.F.R. 19.148)

For the purposes of Chapter 34, Title 38, United States Code, the term "eligible veteran" means any veteran who served on active duty for a period of more than 180 days, any part of which occurred after January 31, 1955, and before January 1. 1977, and was discharged or released therefrom under conditions other than dishonorable. (38 U.S.C. 1652(a)(1)(A)).

For the purposes of Title 38, United States Code, the term "veteran" means a person who served in the active military, naval or air service, and who was discharged or released therefrom under conditions other than dishonorable. The term "active duty" means full-time duty in the Armed Forces, other than active duty for

training. The term "active duty for training" means full-time duty in the Armed Forces performed by Reserves for training purposes. (38 U.S.C. 101(2), (21), and (22).

Basic eligibility for educational assistance is subject to the requirement that the veteran must have served on active duty for a continuous period of 181 days or more, any part of which occurred on or after February 1, 1955, and before January 1, 1977. (38 C.F.R. 21.1040(A))

For purposes of 38 U.S.C. 1652(a)(1)(A) and 38 U.S.C. 1661(a), the term "active duty" does not include any period during which an individual (C) served under the provisions of 10 U.S.C. 511(d) pursuant to an enlistment in the Army National Guard or the Air National Guard or as a Reserve for service in the Army Reserve, Naval

Reserve, Air Force Reserve, Marine Corps Reserve or Coast Guard Reserve unless at some time subsequent to the completion of such period of active duty for training such individual served on active duty for a consecutive period of one year or more. (38 U.S.C. 1662(a)(3).

DISCUSSION AND EVALUATION

The entire evidentiary record has been reviewed in association with the contentions advanced by and on behalf of the appellant. It is asserted the Board has not properly considered that the appellant was originally ordered to extended active duty for the purpose of basic military training and attendance at the United States Air Force Academy Preparatory School. While such service as a pre-cadet assignee would have been considered as a qualifying active service, the order was revoked as he declined to attend the

preparatory school as scheduled. He was subsequently assigned to a Reserve unit and ordered to active duty for training. The character of his Armed Forces duty is properly determined by reference to actual duty, rather than duty originally planned but not performed. The records provided by the service department show clearly that his only Armed Forces duty was active duty for training and it is noted in passing that facts as certified by or on behalf of the service department are binding on the Veterans Administration. (Administrator's Decision 983)

It is maintained that Chapter 34, enacted several years after 38 U.S.C. 101, contains definitions specifically applicable to educational assistance benefits and excludes only that service pursuant to 10 U.S.C. 511(d), as opposed to service the appellant performed pursuant to 10 U.S.C.

672. In this regard, we note that, absent a clear intent to amend or repeal the pertinent definitions of 38 U.S.C. 101, the later-enacted provisions of Chapter 34 should not be construed as doing so by implication. We find no intent to amend the definitions of 38 U.S.C. 101 in the provisions of 38 U.S.C. 1651, which set forth the purpose of Chapter 34 benefits. As noted above, 38 U.S.C. 1652(a)(3)(C) excludes service under 10 U.S.C. 511(d) from the term "active duty." The latter provision (10 U.S.C. 511(d)) was initially enacted by Public Law 88-110 in 1963, following the enactment of 38 U.S.C. 101(21) and (22). It is not shown that the intent of Congress in enacting 38 U.S.C. 1652(a)(3) (C), (Public Law 89-358, Section 2) was other than merely to exclude service under 10 U.S.C. 511(d) from the term "active duty," rather than to include in the term Armed Forces duty

under all other provisions.

It is also argued that an award of educational assistance allowance would be just and equitable as the appellant's transfer to the Ready Reserve was mandatory and as he lost a year of college education when he was assigned involuntarily to active duty for training in October 1968. While these matters are acknowledged by the Board, nevertheless, they do not serve to confer entitlement to the Chapter 34 educational assistance benefits on equitable grounds, as there is no statutory or regulatory basis for such action. The appellant's assertion that a denial of Chapter 34 benefits would constitute a denial of equal protection under the law has also been noted. However, the constitutional question is beyond the power of the Board of Veterans Appeals to

decide. (Johnson v. Robison, 415 U.S. 361 (1974)

In the final analysis, notwithstanding the original orders to extended active duty, the appellant's intentions or the involuntary nature of his assignment to active duty for training or the Ready Reserve, he performed only active duty for training and, therefore, is not entitled to educational assistance benefits under the governing law and regulations. Therefore, we find no obvious error in the prior determination, which is affirmed.

FINDINGS OF FACT

1. In March 1978, it was held by a unanimous decision of a Section of the Board of Veterans Appeals, that the appellant was not entitled to educational assistance benefits under Chapter 34, Title 38, United States Code.

2. The finding of fact and conclusion of law contained in the Board of Veterans Appeals decision of March 1978 are consistent with and well supported by the evidence of record and are not erroneous.

CONCLUSION OF LAW

There is no obvious or reversible error in the Board of Veterans Appeals decision of March 1978; thus, that decision is final. (38 U.S.C. 4003; 38 C.F.R. 19.148)

DECISION

Entitlement to educational assistance allowance under Chapter 34, Title 38, United States Code, is not established. Accordingly, the benefit sought on reconsideration remains denied.

/s/ _____
C. S. ROSS

/s/ _____
BRUCE KANNEE

/s/ _____
RAE WOOD

/s/ _____
C. D. ROMO

/s/ _____
E. M. KRENZER

/s/ _____
JAMES J. BUTLER

APPENDIX F

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-fifth day of November, one thousand nine hundred and eighty-one.

Present:

HON. J. EDWARD LUMBARD
HON. WALTER R. MANSFIELD
HON. ELLSWORTH A. VAN GRAAFEILAND

Circuit Judges.

----------X

LAWRENCE R. MULLIGAN,

Plaintiff-Appellant,

v. DOCKET NO. 81-6046

VETERANS ADMINISTRATION,

Defendant-Appellee.

----------X

A petition for a rehearing having been filed herein by Lawrence R. Mulligan, appellant pro se,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

A. DANIEL FUSARO,
Clerk

By: /s/_____
FRANCIS E. GINDHART
Chief Deputy Clerk

Filed: November 25, 1981

APPENDIX G

MULLIGAN v. VETERANS ADMINISTRATION

79 CIV 1993 (LBS)

Memorandum Endorsement

The Plaintiff's motion for reargument is denied on the merits. Since it is clear that the motion raises no new issues nor cites any authorities not previously considered, we need not resolve defendant's contention that the motion is untimely pursuant to Local Civil Rule 3(j).

SO ORDERED.

Dated: New York, New York
January 13, 1981

/s/_____
U.S.D.J.

APPENDIX H

RELEVANT PORTIONS OF STATUTES AND REGULATIONS

10 U.S.C. §101(22)

"Active duty" means full-time duty in the active military service of the United States. It includes duty on the active list, full-time training duty, annual training duty, and attendance, while in the active military service, at a school designated as a service school by law or by the Secretary of the military department concerned. (emphasis supplied)

Pub. L. 85-861, Sept. 2, 1958

10 U.S.C. §511(d)

... a non-prior-service person who is under 26 years of age, who is qualified for induction for active duty in

an armed force, and who is not under orders to report for induction into an armed force...may be enlisted ...as a Reserve for service in the...Air Force Reserve... for a term of six years. Each person enlisted under this subsection shall perform an initial period of active duty for training of not less than four months... (emphasis supplied)

Pub. L. 88-110 §3, Sept. 3, 1963

38 U.S.C. §101(21)

The term "active duty" means -

(D) service as a cadet at the United States Military, Air Force or Coast Guard Academy, or as a midshipman at the United States Naval Academy

Pub. L. 85-857, Sept. 2, 1958

38 U.S.C. §101(22)

The term "active duty for training" means -

(A) full-time duty in the Armed Forces performed Reserves for training purposes;

Pub. L. 85-857, Sept. 2, 1958

38 U.S.C. §210(c)1

The Administrator has authority to make all rules and regulations which are necessary or appropriate to carry out the laws administered by the Veterans' Administration and are consistent therewith...

Pub. L. 85-857, Sept. 2, 1958

38 U.S.C. §211(a)

Except as provided in Sections 784, 1661, 1761, and as to matters arising under chapter 37 of this title, the decisions of the Administration on any question of law or fact concerning a claim for benefits or payments under any law administered by the Veterans' Administration shall be final

and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision. (emphasis supplied)

Pub. L. 85-857, Sept. 2, 1958

38 U.S.C. §1651

... the education program created by this chapter is for the purpose of ...(3) providing vocational readjustment and restoring lost educational opportunities to those service men and women whose careers have been interrupted or impeded by reason of active duty after January 31, 1955, and (4) aiding such persons in attaining the vocational and educational status which they might normally have aspired to and obtained had they not served their country.

Pub. L. 89-358, §2, Mar. 3, 1966

38 U.S.C. §1652(a)(3)(C)

For the purposes of paragraph 1 (A) and section 1661 (a), the term "active duty" does not include any period during which an individual...(C) served under the provisions of section 511(d) of title 10 pursuant to an enlistment in the...Air Force Reserve...unless at some time subsequent to the completion of such period of active duty for training such individual served on active duty for a consecutive period of one year or more...

Pub. L. 38-358 §2, Mar. 3, 1966
as amended by Pub.L.93-508, §a(3), 1974

38 C.F.R. §3.6(b)

(b) "Active duty". This means:

(1) Full-time duty in the Armed Forces, other than active duty for training; (emphasis supplied)

38 C.F.R. §21.1021

Subpart B Veterans' Educational Assistance Under 38 U.S.C. Chapter 34

(a) "Eligible veteran" or veteran" means a veteran whose service meets the requirements of 21.1040. Unless otherwise specifically identified the terms include a person on active duty who has basic eligibility for educational assistance under the provisions of §21.1040(e).

(b) "Active duty" means active duty as defined in §3.6(b), except (b)(4) of this chapter. It also includes the initial period of active duty for training in the Reserves or National Guard pursuant to Section 511(d), title 10, United States Code, served subsequent to January 31, 1955 provided that at some time subsequent to the completion of such period of active duty for training the veteran serves on active duty for a consecutive period of 1 year or more (excluding service as a cadet

or midshipman at one of the service academies). (38 U.S.C. 1652(a) (3).... (emphasis supplied)

Opposition

Office - Supreme Court, U.S.
FILED
JUN 21 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1760

In the Supreme Court of the United States

OCTOBER TERM, 1981

LAWRENCE R. MULLIGAN, PETITIONER

v.

VETERANS ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

REX E. LEE
Solicitor General

J. PAUL MCGRATH
Assistant Attorney General

SUSAN MILLINGTON CAMPBELL
MICHAEL H. DOLINGER
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether 38 U.S.C. 211(a) bars judicial review of a claim that the Veterans Administration erroneously denied an application for veterans' educational benefits.

2. Whether Congress' provision of veterans' educational benefits for those individuals who served on "active duty," but not "active duty for training," violates the equal protection component of the Due Process Clause of the Fifth Amendment.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1760

LAWRENCE R. MULLIGAN, PETITIONER

v.

VETERANS ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinions of the court of appeals (Pet. App. A1-A4) and the district court (Pet. App. A7-A24) are not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. A1-A4) was entered on October 9, 1981, and a petition for rehearing was denied on November 25, 1981 (Pet. App. A53-A54). The petition for a writ of certiorari was filed on February 23, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In June 1968, petitioner was advised that he had been selected to attend the United States Air Force Academy Preparatory School, in preparation for winning an appointment to the Academy. By virtue of his selection, he was required to enlist in the Air Force Reserve for a period of six

years, and on June 26, 1968, he was so enlisted. By order dated July 8, 1968, petitioner was ordered to extended active duty pursuant to 10 U.S.C. 672(d) for one year beginning July 11, 1968, for purposes of assignment to the student squadron at the Preparatory School (Pet. App. A8-A9, A21 n.1, A27-A28, A40-A41).

On July 16, 1968, the Air Force revoked the order dated July 8, 1968 because petitioner declined to attend the Preparatory School. He was then assigned instead to a medical service squadron of the Air Force Reserve and was designated a Ready Reservist. Subsequently, petitioner was called to active duty for training for a period of 191 days, from December 1, 1968 to June 10, 1969. Following several years in the Reserves, during which he attended four periods of annual training of two weeks' duration, petitioner was honorably discharged from the Air Force on June 25, 1974, at the expiration of his six-year term of service (Pet. App. A9, A28-A29, A41-A43).

2. In June 1972, petitioner applied for educational benefits to attend law school, pursuant to 38 U.S.C. 1651 *et seq.* The Veterans Administration (VA) denied his application on the ground that the type of service petitioner performed—active duty for training, as distinguished from active duty—is not qualifying service entitling an applicant to receive veterans' educational benefits. This decision was affirmed by the Board of Veterans Appeals (Pet. App. A25-A36), which adhered to its decision on reconsideration (*id.* at A37-A52). The Board reasoned that under 38 U.S.C. 1652(a)(1)(A), an "eligible veteran" entitled to receive veterans' educational assistance includes any veteran who "served on active duty for a period of more than 180 days, any part of which occurred after January 31, 1955, and before January 1, 1977, and was discharged or released therefrom under conditions other than dishonorable." Because the term "active duty" is defined for purposes of

Title 38 to mean "full-time duty in the Armed Forces, *other than active duty for training*" (38 U.S.C. 101(21)(A); emphasis added), the Board held that petitioner's period of active duty for training did not qualify him for educational benefits. Pet. App. A30-A31, A44-A46, A47-A49.

The Board also rejected petitioner's contention that the general definition of "active duty" in 38 U.S.C. 101(21) does not govern eligibility for veterans' educational benefits, because 38 U.S.C. 1652(a)(3)(C) explicitly excludes from the term "active duty" as used in the provisions of Title 38 concerning eligibility for educational benefits certain active duty for training served under 10 U.S.C. 511(d), but does not explicitly exclude active duty for training under 10 U.S.C. 672(d), pursuant to which petitioner served. In the Board's view, the later enactment of the educational benefits provisions in 38 U.S.C. 1651 *et seq.* did not amend the general definitions in 38 U.S.C. 101. Thus, the Board found that the purpose of the reference to 10 U.S.C. 511(d) in the chapter dealing with educational benefits was merely to ensure that the particular type of service under that section was excluded, not implicitly to *include* other active duty for training that was explicitly excluded by 38 U.S.C. 101(21). Pet. App. A47-A49.

3. Petitioner then filed this action in the United States District Court for the Southern District of New York, contending that the VA's denial of educational benefits was arbitrary and capricious and inconsistent with the statutory language. Petitioner also argued that, if the VA correctly applied the statutory criteria, the statutory classification violates constitutional equal protection principles because it mandates different treatment of similarly situated veterans.

The district court held that it was without jurisdiction over petitioner's nonconstitutional claims by virtue of

38 U.S.C. 211(a). That Section provides, with exceptions not relevant here, that

> the decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans and their dependents or survivors shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise.

Petitioner did not oppose the VA's motion for summary judgment on his claim that the VA's determination was arbitrary and capricious, conceding that 38 U.S.C. 211(a) bars jurisdiction over such a claim. Pet. App. A10-A11. With regard to petitioner's other nonconstitutional argument—that the general definition of "active duty" in 38 U.S.C. 101(21) does not apply to Chapter 34 of Title 38, which provides for educational benefits—the court concluded that petitioner simply challenged the VA's interpretation and application of the statute in the context of his particular claim for benefits and that 38 U.S.C. 211(a), as construed by this Court in *Johnson* v. *Robison*, 415 U.S. 361, 367, 370-373 (1974), therefore prohibits judicial review of the VA's action. Pet. App. A14-A15.

The district court concluded that 38 U.S.C. 211(a) does not bar judicial review of petitioner's constitutional claim (Pet. App. A15-A16, citing *Johnson* v. *Robison*, *supra*, 415 U.S. at 377-378, 383 & n.18), but it rejected that claim on the merits (Pet. App. A16-A20). The court observed (*id.* at A16-A17) that petitioner did not challenge the general distinction between reservist and active veterans, but rather argued that his active duty for training for 191 days under 10 U.S.C. 672(d) was, in terms of length of commitment and loss of personal freedom, more akin to active duty that qualifies a veteran for educational benefits under 38 U.S.C.

1652(a)(1)(A) than to active duty for training under 10 U.S.C. 511(d), which is excluded from eligibility for educational benefits by virtue of 38 U.S.C. 1652(a)(3)(C). The court found (Pet. App. A18-A19), however, that the disruption of petitioner's life was more akin to that of a person serving under 10 U.S.C. 511(d) than to that normally suffered by an active duty veteran, who generally serves on active duty for two years. This distinction, the court held, is rationally related to the statutory goal, set forth in 38 U.S.C. 1651(1), of "enhancing and making more attractive service in the Armed Forces of the United States." See Pet. App. A19, citing *Johnson* v. *Robison, supra,* 415 U.S. at 376, 382.

4. The court of appeals affirmed (Pet. App. A1-A4). The court held that it was without jurisdiction to consider petitioner's nonconstitutional claims. It concluded (*id.* at A3) that, although petitioner contended that he was challenging regulations of the VA, his application for benefits was actually denied on the basis of the VA's interpretation of statutory provisions. The court held that jurisdiction over such a claim was barred by 38 U.S.C. 211(a), as construed by this Court in *Johnson* v. *Robison, supra.* The court also rejected petitioner's constitutional challenge, noting that, as this Court observed in *Johnson* v. *Robison,* Congress intended to provide veterans' benefits "to compensate for the disruption that military service causes to civilian lives" (Pet. App. A4, quoting 415 U.S. at 377). The court of appeals found it "obvious that 'active duty for training,' even of 191 days, does not disrupt normal civilian life to the same degree as regular active duty" (Pet. App. A4).

ARGUMENT

The decision of the court of appeals is correct, is fully consistent with this Court's decision in *Johnson* v. *Robison,* 415 U.S. 361 (1974), and does not conflict with the

decision of any other court of appeals. Review by this Court therefore is not warranted.

1. a. Judicial review of petitioner's nonconstitutional objection to the denial of his application for educational benefits—that the VA erred in interpreting 38 U.S.C. 1652(a)(1)(A) in a manner that renders him ineligible for those benefits—is plainly barred by 38 U.S.C. 211(a). Section 211(a) provides that "the decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans * * * shall be final and conclusive" and that no court of the United States "shall have power or jurisdiction to review any such decision." The VA's conclusion in this case that petitioner is not an "eligible veteran" within the meaning of 38 U.S.C. 1652(a)(1)(A) and therefore is not entitled to veterans' educational benefits is a decision on a "question of law" under a veterans' benefits law administered by the VA. That decision therefore is "final and conclusive," and no court of the United States has "power or jurisdiction" to review it.

This is precisely the interpretation given 38 U.S.C. 211(a) in *Johnson* v. *Robison*. There, the Court noted that the bar in Section 211(a) applies when a "decision of law or fact 'under' a statute is made by the Administrator in the interpretation or application of a particular provision of the statute to a particular set of facts." 415 U.S. at 367. Here, the VA interpreted and applied 38 U.S.C. 1652(a)(1)(A) to the particular set of facts presented by petitioner's application for educational benefits.

Petitioner seeks to avoid this conclusion by contending that he was denied benefits on the basis of regulations promulgated by the VA, not the statute itself. See Pet. 11-15. The court of appeals correctly rejected this contention, concluding that "[petitioner's] application for benefits was denied on the basis of statutory provisions" (Pet. App.

A3). A reading of the opinions of the Board of Veterans Appeals confirms the correctness of the court of appeals' conclusion, for although there are passing references in those opinions to a VA regulation (Pet. App. A31, A35, A39, A45), the Board's discussion of the legal issues turns almost entirely on the text of the statutory provisions. Moreover, the regulation cited by the Board, 38 C.F.R. 21.1040(a), merely restates the statutory eligibility requirements in 38 U.S.C. 1652(a)(1)(A). Thus, petitioner's challenge to the Board's references to 38 C.F.R. 21.1040(a) is, in substance, nothing more than a challenge to the Board's application of the statute itself; it therefore is barred by 38 U.S.C. 211(a), as construed in *Johnson* v. *Robison*.

Petitioner, however, apparently rests his argument not on the Board's references to 38 C.F.R. 21.1040(a), but on other VA regulations, 38 C.F.R. 21.1021 and 3.6(b). See Pet. 5. But these regulations were not even cited by the Board of Veterans Appeals. In any event, 38 C.F.R. 21.1021 simply embodies the VA's interpretation of the statutory language in 38 U.S.C. 1652(a)(1)(A). Thus, under 38 C.F.R. 21.1021(b), the term "active duty" is given the meaning set forth in 38 C.F.R. 3.6(b), which, like 38 U.S.C. 101(21), excludes active duty for training. Petitioner's challenge to these regulations therefore also is nothing more than a challenge to the VA's interpretation of the statute itself, and as such is plainly barred by 38 U.S.C. 211(a). Cf. *Carter* v. *Cleland*, 643 F. 2d 1, 8-9 (D.C. Cir. 1980). Even if petitioner were correct, however, that he should be understood to be challenging the validity of VA regulations, such a challenge would nevertheless be barred in this case by 38 U.S.C. 211(a). The legislative history of Section 211(a) discussed by this Court in *Johnson* v. *Robison* makes clear that Congress intended to bar judicial challenges to individual

benefit determinations even when they are based on VA regulations. 415 U.S. at 373.[1]

b. Although neither court below reached the merits of petitioner's statutory contention, in light of their jurisdictional holdings, the decisions of the Board of Veterans Appeals plainly are correct. This Court made clear in *Johnson* v. *Robison* that the definition of "active duty" in 38 U.S.C. 101(21), which excludes active duty for training, controls eligibility for educational benefits. See 415 U.S. at

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[1]It is true that in *Wayne State University* v. *Cleland*, 590 F. 2d 627, 631-632 (6th Cir. 1978), discussed by petitioner (Pet. 13-14), the Sixth Circuit held that Section 211(a) did not bar a suit challenging the Administrator's authority to promulgate certain regulations that had the effect of limiting the types of educational programs for which veterans would be eligible to receive benefits. See also *Merged Area X (Education)* v. *Cleland*, 604 F. 2d 1075, 1078 (8th Cir. 1979); *Evergreen State College* v. *Cleland*, 621 F. 2d 1002, 1007-1008 (9th Cir. 1980); *University of Maryland* v. *Cleland*, 621 F. 2d 98, 101 (4th Cir. 1980). Assuming arguendo that these cases were correctly decided, they would not conflict with the decision by the Second Circuit in the instant case even if this case were to be viewed as a challenge to VA regulations. *Wayne State University* and the related decisions involved APA-type challenges to regulations upon their promulgation, not, as here, attempted judicial review of the VA's denial of an individual claim for benefits. The Sixth Circuit itself recognized in *Wayne State University* that 38 U.S.C. 211(a) bars judicial review of the numerous individual benefit determinations made by the VA. 590 F. 2d at 632; see also *University of Maryland* v. *Cleland*, *supra*, 621 F. 2d at 100-101; *Johnson* v. *Robison*, *supra*, 415 U.S. at 370-373; cf. *United States* v. *Erika, Inc.*, No. 80-1594 (Apr. 20, 1982), slip op. 8-9.

Devine v. *Cleland*, 616 F. 2d 1080 (9th Cir. 1980), the other court of appeals decision cited by petitioner (Pet. 14), involved a constitutional challenge to the VA's procedures for terminating benefits, not, as here, a statutory challenge to the VA's termination decision on the merits. See 616 F. 2d at 1084. The district court decision relied upon by petitioner (Pet. 12), *Taylor* v. *United States*, 385 F. Supp. 1034, 1036 (N.D. Ill. 1974), also raised a constitutional issue and, in any event, the judgment later was vacated as moot, 528 F. 2d 60 (7th Cir. 1976).

362-363 & n.2. The legislative history confirms the correctness of this interpretation of the statute. See H.R. Rep. No. 1258, 89th Cong., 2d Sess. 8 (1966).

2. The courts below correctly rejected petitioner's constitutional challenge to Congress' exclusion of active duty for training from the service that renders a veteran eligible for educational benefits.[2] In *Johnson* v. *Robison, supra,* this Court stated that in enacting the educational benefits provisions, Congress principally intended "to compensate for the disruption that military service causes to civilian lives." 415 U.S. at 377. The Court concluded that the disruption caused by active military service is qualitatively different from, and quantitatively greater than, that caused by alternative service, and upheld the exclusion of conscientious objectors from eligibility for veterans' educational benefits. *Id.* at 378-382.

As the court of appeals held (Pet. App. A4), the exclusion of active duty for training from eligible service likewise is rationally related to the congressional purposes underlying the establishment of the educational benefits program because, as a general matter, the disruption of civilian life occasioned by active duty for training is significantly less than that caused by active duty. The length of active duty for training is generally less than the two-year period ordinarily required for active duty (Pet. App. A-19; *Johnson* v. *Robison, supra,* 415 U.S. at 378); persons on active duty for training usually are not sent overseas as their active duty counterparts might be; and the scope of their duties generally is narrower than that of active duty service members. See, *e.g.*, 10 U.S.C. 682. For example, 38 U.S.C. 1652(a)(3)(C) provides that Reserve or Guard active duty

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[2]Contrary to petitioner's contention (Pet. 10), the court of appeals held that it had jurisdiction over the constitutional claim and rejected it on the merits (Pet. App. A4).

for training pursuant to 10 U.S.C. 511(d) is counted toward qualifying service for educational benefits *only* if at some time subsequent to the completion of such period of active duty for training the individual served on active duty for a consecutive period of one year or more (not including any service as a cadet or midshipman at one of the service academies).[3]

Petitioner contends (Pet. 15-17), however, that the district court should not have granted summary judgment for the VA on the constitutional issue because there was a disputed issue of fact as to whether individuals who served on active duty were differently situated, with respect to the period of time they generally served, from those who served on active duty for training. This contention is without merit. The pertinent inquiry is whether Congress reasonably could have believed when it enacted the statute in 1966

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[3]See S. Rep. No. 93-907, 93d Cong., 2d Sess. 62 (1974), which states regarding Section 1652(a)(3)(C):

> The traditional reason for not counting a Reserve or Guard member's initial period of active duty training for purposes of establishing entitlement to veterans educational benefits, according to the Veterans' Administration, has been that the "short period of orderly planned service" did not constitute a sufficient "interruption" of an individual's civilian activities to warrant the granting of educational assistance benefits. Section 1651 declares that the intent of the educational program created under chapter 34 is, in part, for the purpose of:
>
> > • • • (3) providing the vocational readjustment and restoring lost educational opportunities to those servicemen and women whose careers have been interrupted or impeded by reason of active duty training after January 31, 1955.
>
> Whatever merit concept the argument may have in not counting initial time by a Reserve or Guard member, in normal circumstances, the Committee believes that there has been sufficient "interruption" by subsequent active duty service for a consecutive period of a year or more to warrant full entitlement to benefits for all active duty for training.

that the two classes would in general be differently situated in this or any other relevant respect, not what a court might find as a factual matter with respect to the average length of service at any given point in time between 1955 and 1977, the period during which active duty renders an individual eligible for benefits. See *Vance* v. *Bradley*, 440 U.S. 93, 110-111 (1979); cf. *United States Postal Service* v. *Council of Greenburgh Civic Associations*, 453 U.S. 114, 117 (1981). That standard plainly was satisfied here, see *Johnson* v. *Robison*, *supra*, 415 U.S. at 376-383, and no *material* facts therefore remained to be resolved. Fed. R. Civ. P. 56.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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